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No. 108

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IN THE

Supreme Court of the United States

THE CUYAHOGA RIVER POWER COMPANY, Appellant,

THE NORTHERN OHIO TRACTION AND LIGHT  
COMPANY and THE NORTHERN OHIO POWER  
COMPANY, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF OHIO,  
EASTERN DIVISION.

SUPPLEMENTAL BRIEF FOR APPELLEES.

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# In the Supreme Court of the United States.

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OCTOBER TERM, 1919. No. 102.

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*The Cuyahoga River Power Company, Appellant,*

vs.

*The Northern Ohio Traction and Light Company and the  
Northern Ohio Power Company, Appellees.*

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APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE NORTHERN DISTRICT OF OHIO, EAST-  
ERN DIVISION.

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## SUPPLEMENTAL BRIEF FOR APPELLEES

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The alleged rights of the plaintiff Power Company to construct a system of hydro-electric plants on the waters of the Cuyahoga and other rivers have been the subject of judicial investigation in the following cases:—

1. *Cuyahoga River Power Company vs. Northern Realty Company and Northern Ohio Traction & Light Company*, 244 U. S. 298, 61 L. ed. 1153;

2. Cuyahoga River Power Company *vs.* City of Akron, 210 Fed. 524, 240 U. S. 462;
3. Sears *vs.* City of Akron, 246 U. S. 242, 62 L. ed. 688;
4. Sears *vs.* Northern Ohio Traction & Light Company, U. S. District Court for Northern District of Ohio. (See opinion, Appendix to original brief for appellees, pages 13-23.)

The present case is the fifth case in which plaintiff Power Company has asserted the same rights. The first case named above was an action at law to appropriate by condemnation the same three pieces or parcels of land which the Power Company is endeavoring to acquire by a receiver in the present case. The present case and the other three cases named above are suits in equity instituted for the purpose of appealing to the Chancellor to protect the Power Company's alleged legal rights. The legal right, which the Power Company claims, is the right to appropriate the properties necessary for the carrying out of its pretentious and extravagant scheme. The first suit mentioned above was a condemnation proceeding and the Court denied the Power Company's alleged right of condemnation. There was an earlier condemnation suit mentioned in paragraph seventh of the Bill, but this suit was dismissed, as appears on page 3 of the Transcript of Record, in the condemnation suit which came to this Court, and is reported in 244 U. S. 298. This alleged right of condemnation is the pivot around which this mass of litigation revolves. A court of competent jurisdiction has denied that the Power Company has any such right. It is elementary that a court of equity will not entertain a proceeding to protect an alleged legal right, unless that right has been established at law or is clear and the violation of the right is palpable. On this subject see the following cases:—

*Parker vs. The Winnepesaukee Lake Cotton and Woolen Co.*, 67 U. S. 545, 17 L. ed. 333;  
*Consolidated Canal Company vs. Mesa Canal Co.*, 177 U. S. 296, 44 L. ed. 777.

The bill does not show that the Power Company lost its condemnation suit, but that fact appears by the records of this Court and the Court will take judicial notice of the facts shown by its own records. In *Dimmick vs. Tompkins*, 194 U. S. 540, in which this question was presented, the Court said:—

“In a case like this the Court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it. The principle permitting it is announced in the following cases: *Butler vs. Eaton*, 141 U. S. 240, 242, 35 L. ed. 713, 714, 11 Sup. Ct. Rep. 985; *Craemer vs. Washington*, 168 U. S. 124, 129, 42 L. ed. 407, 409, 18 Sup. Ct. Rep. 1; *Bienville Water Supply Co. vs. Mobile*, 186 U. S. 212, 217, 46 L. ed. 1132, 1135, 22 Sup. Ct. Rep. 820.”

It will assist to a better understanding of the issues presented in the present case if we will examine the several cases cited above in which the Power Company's claims have been considered.

I. CUYAHOGA RIVER POWER COMPANY *vs.* NORTHERN REALTY COMPANY, AND NORTHERN OHIO TRACTION COMPANY, 244 U. S. 298.

A full statement of the facts appears in the opinion of this Court, 244 U. S. 298. This condemnation suit was tried in the Common Pleas Court of Summit County, Ohio, which dismissed the petition on May 1st, 1914 (Transcript of Record in said case, page 232). This action was affirmed by judgment of the Court of Appeals of the Eighth District of Ohio. The Power Company endeavored to take the case to the Supreme Court of Ohio on the ground that a constitutional question was involved, but that Court refused to take jurisdiction. The Power Company then brought the case to this Court by writ of error to the Court

of Appeals of the Eighth District. This Court dismissed the case for want of jurisdiction (June 4th, 1917), holding that the Ohio Court—

"must be regarded as having rested its judgment dismissing condemnation proceedings on its decision of the preliminary questions raised, i. e., the existence of the petitioning corporation, its right to make the appropriation, its inability to agree as to the compensation to be paid for the property, and the necessity for appropriation,—grounds broad enough to sustain the judgment irrespective of the merits of the Federal question involved in the defense concerning the public character of the use to which the owner of the property sought to be condemned had applied it, and the consequent want of authority to take it for the benefit of the petitioning corporation" (Syllabus, point 2).

It might be true that the Power Company lost this condemnation suit because it had failed to establish any one of certain preliminary questions, as, for example, its inability to agree as to the compensation to be paid for the property. On the other hand, it may have failed to establish certain other preliminary questions as, for example, its existence, or its right to make the appropriation or the necessity for the appropriation. The third point of the syllabus reads as follows:—

"The Federal Supreme Court will not take jurisdiction of a writ of error to a State Court where the absence of an opinion by the Court below makes it impossible to say whether its judgment rested upon State questions adequate to sustain it, independent of the Federal question, both being in the case."

No effort has been made by the Power Company to secure relief from this adverse judgment in the condemnation suit other than the writ of error mentioned above, in which it was unsuccessful. If the difficulty in the trial Court was

failure to establish inability to agree; that point should have been made clear by the record. If that was the situation presented, the Power Company should have moved to dismiss the case and it should then have proceeded to negotiate with the land owner for an agreement upon the compensation to be paid, and, if such an agreement could not be made, then it could have instituted a new condemnation suit. The record of the condemnation suit filed in this Court gives no indication of the particular point upon which the suit was decided against the Power Company. It is clear, however, that the Power Company was unable to establish its right to condemnation and it is a fair conclusion that such an alleged right does not in fact exist. The most favorable view that can be taken for the Power Company is that its alleged right to condemn is extremely doubtful. A court of equity will not take jurisdiction to protect any such doubtful legal right.

## II. CUYAHOGA RIVER POWER COMPANY vs. CITY OF AKRON, 210 Fed. 524.

This was a suit in equity by the same Cuyahoga River Power Company. It asserted in its bill, which was filed July 14th, 1913, practically the same rights asserted by it in the bill filed in the present case. The City of Akron, defendant, proposed to construct water works in the valley of the Cuyahoga River and to furnish water to the inhabitants of the city. The city evidenced its intention by passing an appropriate ordinance. The bill asked for an injunction against the city to prevent it from appropriating the waters of the river on the ground that it (the Power Company) had already appropriated these waters for its own hydro-electric purposes. The defendants filed a motion to dismiss, which was granted, the Court filing an elaborate opinion which is reported in 210 Fed. 524. The Power Company appealed the case to this Court which, on March 26th, 1916, reversed the District Court and sent the case back to be dealt with on the merits (240 U. S. 462). This Court held that the District Court had not paid sufficient

attention to certain allegations of the bill and that whether the plaintiff had any rights that the city was bound to respect could be decided only by taking jurisdiction of the case. Apparently the Power Company has taken no further proceedings in the District Court in that case, probably because it determined that it would be wiser for it to proceed with the case of *Sears vs. Akron*, the bill in which contains certain allegations which were not contained in the bill filed in *Cuyahoga River Power Company vs. Akron*.

### III. SEARS *vs.* CITY OF AKRON, 246 U. S. 242.

This was a suit in equity instituted by John H. Sears, the trustee under the mortgage given by the Cuyahoga River Power Company, in which the bill, filed July 24th, 1915, contains practically the same allegations as the bill in the present case, and allegations in some respects more definite than those in the bill filed in *Cuyahoga River Power Company vs. Akron*. In this, as in every one of these equity cases, a motion to dismiss was made and granted. The opinion filed in the District Court upon that motion in *Sears vs. Akron*, is printed in the Appendix to the original brief filed on behalf of appellees, pages 1 to 11, inclusive. The basis for the granting of the motion to dismiss is stated in the opinion filed in this Court March 4th, 1918, in the following language:—

“The motion to dismiss the bill was sustained by the District Court, on the ground that the company did not possess any such contract, right or property as the city was alleged to have impaired or invaded or threatened to appropriate; and also on the ground that the bill did not set forth facts entitling plaintiff to seek relief in equity and did disclose laches.”

That part of the opinion of the District Court which sustains the defense of laches is printed on page 42 of the original brief for appellees. This Court did not discuss the question of laches, but, under the facts alleged in the

bill in the present case, and particularly in the light of what is said on this subject in the original brief for the appellees, the laches of the plaintiff Power Company, appearing upon the face of the bill, is a sufficient ground for sustaining the motion to dismiss.

Plaintiff Power Company apparently relies in the present case upon its alleged contract and property rights under its charter and the adoption of its plan of development, just as it did in the case of *Sears vs. Akron*. Its alleged contract rights were denied by this Court in its opinion in that case. That part of the opinion which disposes of that question is quoted on page 16 of the original brief filed on behalf of the appellees. That decision disposes of plaintiff's alleged contract rights. This Court then proceeded in its opinion in *Sears vs. Akron* (page 249) to consider plaintiff's alleged property rights and used the following language:—

"*Second.*—As to the alleged property rights: It follows from what has been said above that, at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan, or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the General Laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken (*Adirondack R. Co. vs. New York*, 176 U. S. 335, 44 L. Ed. 492, 20 Sup. Ct. Rep. 460),

and the Act of 1911 and the ordinance were both passed before the company had acquired any property."

Counsel for the appellant point out very clearly in their brief that this Court expressly did not pass upon any rights that might have been acquired by the Power Company as the result of the adoption of the plan, or as the result of the commencement of condemnation proceedings, for the reason that the Act of 1911 and the ordinance passed in pursuance thereof operated to revoke any charter rights which the company might otherwise have had to acquire conflicting property rights. In the present case there is no such legislation interfering with the acquisition of property rights by the Power Company. Counsel for the Power Company therefore argue that there is nothing in this decision in *Sears vs. Akron* which interferes with their proposition that the adoption of their plan and the commencement of condemnation proceedings vested rights in the Power Company which it can assert in the present proceeding. It is true that the appellees in the present proceeding have not the same defense to this proposition which the city of Akron had, based upon the Act of 1911 and the ordinance of the city passed in pursuance thereof. It does not follow, however, that the plaintiff Power Company has shown any right to relief in equity. This question is fully discussed at a later point in this brief.

This Court, in *Sears vs. Akron*, proceeded under the third heading (pages 250-257) to consider the Power Company's alleged riparian rights and stated that:—

"the city insists that the bill fails to show that it has taken, or proposes to take, or will injure any of these, and also that it does not appear that the company has, in respect to any of these properties, any riparian right which conceivably could be taken or injured. This contention, which involves matters of State law, may possibly raise some questions presented to the State Court in *Boettle vs. Akron*, 93 Ohio State, 490, 113 N. E. 1069. But whether it is in all respects sound,

we need not determine; for it is clear that upon the facts alleged in the bill, the rights of the plaintiff in this property and the injury thereto, if any are not such as to entitle him to relief in equity."

The Court also said (page 253):—

"The absence of facts entitling plaintiff to equitable relief is not supplied by such general allegations of fraud or insolvency as the plaintiff has made."

The facts alleged in the bill in the case under discussion are practically the same as the facts alleged in the bill in the present case, but there is no allegation of insolvency in the present case. If in that case the allegations of the bill were not such as to entitle the plaintiff to relief in equity, the same result must follow in the present case.

IV. SEARS *vs.* THE NORTHERN OHIO TRACTION AND LIGHT COMPANY AND THE NORTHERN OHIO POWER COMPANY, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO (see opinion, Appendix to plaintiff's original brief, pages 13 to 23).

This was another suit in equity filed by Sears, the mortgage trustee, against the defendants in the present case. The allegations of the bill are practically the same as those in the bill filed in the present case. The defendants made the usual motion to dismiss, which, as usual, was granted. This motion was based upon two grounds, which were described in the opinion of the District Court (Appendix to original brief of appellees, page 1), as follows:—

"*First*.—Because the bill does not state a cause of action within the equity jurisdiction of this Court, and

"*Second*.—Because the alleged property rights and interests of the plaintiff had been adjudicated, or are now pending for final adjudication, in the Supreme Court of the United States."

On the first ground the Court held that there was no allegation of insolvency and the mortgage trustee had an adequate remedy at law in a suit for damages. The same is true in the present case, for the bill contains no allegation of insolvency. In the above-named case the District Court further said (Appendix, page 21), in speaking of the right to condemn properties required by the Power Company for its corporate purposes:—

"If the appropriation case, if there is but one, or cases, if there are two, are such as the plaintiff alleges that they are, the decision of them will determine the rights of the plaintiff grantor in the premises described in the bill in this case."

The appropriation case referred to is Cuyahoga River Power Company *vs.* Northern Realty Company and Northern Ohio Traction and Light Company, *supra*, which, as shown above, resulted in a defeat for the plaintiff Power Company. This result, as we contend and as was the view of the District Judge, according to the above quotation, is a complete defense to the plaintiff Power Company's claims. The District Court further said:—

"The conclusion which we have reached also calls for the dismissal of the bill upon the second ground of the motion filed, viz: because the alleged property rights of the plaintiff have been adjudicated in the case which is now pending for review in the Supreme Court of the United States. It is difficult, as we have said, to discover any substantial difference in the claims asserted in the bill filed in this case from those asserted in the case commenced in this Court by this same plaintiff in July, 1915, which is now pending in the Supreme Court of the United States, and there can be no doubt that the disposition of that case will dispose of this one. For this reason also the motion of defendant to dismiss the bill will be sustained."

The case referred to as then pending in this Court is the case of *Sears vs. Akron*, discussed in full above. Although this Court did not in that case determine the nature and extent of the plaintiff Power Company's alleged rights arising out of its charter and the adoption of its plan, it did decide that there was an absence of facts entitling plaintiff to equitable relief. Although the plaintiff Power Company is not barred by this decision in *Sears vs. Akron* on the theory of *res adjudicata*, as the defendants and appellees in the present case were not parties to the former one, the decision was none the less rendered upon consideration of the same set of facts as are set forth in the bill in the present case.

No appeal has been taken from the decision of the District Court in *Sears vs. The Northern Ohio Traction and Light Company and The Northern Ohio Power Company* sustaining the motion to dismiss.

#### V. PRESENT CASE.

In the present case the usual motion to dismiss was made in the District Court and was, as usual, sustained. The reason given for the motion was "that the facts therein set up do not entitle the plaintiff to the equitable relief demanded." The Court said (Record, page 38):—

"The contention of the plaintiff is that by virtue of its charter it has appropriated the potentialities of the river and its tributaries within the boundaries by it designated in its resolution of improvement, and that it is entitled, because of its incorporation under the General Laws of the State, to exclude any use of the water power of these streams of the nature of the use which it anticipates enjoying in the future, while it proceeds, however dilatorily, to make its improvements in detail and to complete its ambitious scheme. In brief, its proposition is that its charter is equivalent to a contract with the State of Ohio, giving it the exclusive right to the employment of the benefits which nature

has conferred upon the public through the forces of these streams to the end that until it finds itself able to completely occupy all the territory which it has privately designated to be necessary for its use, the public shall not have the advantage of any portion not immediately occupied by it through the employment of the resources thereof by another public utility company."

The Court held that this is the controlling question in the case and said further (Record, page 40):—

"It is not necessary to determine to grant this motion, whether or not complainant has an adequate remedy at law. It may be that the Traction Company's occupancy of its own properties for the purposes complained of is subordinate to the rights of the complainant under its charter, but, if so, that subordination does not exist until the complainant has completed the steps required by law by which only it has acquired the dominant and exclusive interest. Conceding, without deciding, that it may hereafter so subordinate the rights of the Traction Company to its own right and, by enforcing the latter, to exclude the Traction Company from its present use of the water power and privileges generated on the latter's own property, pending that time we see no reason why the State of Ohio might not permit the Traction Company to convey, through the improvement of its own property, to the public the favors which nature has there provided."

The District Court further said (Record, page 40):—

"We are compelled to conclude that there is no equity in complainant's contention respecting the affect of its charter."

The Power Company, complainant, relies in the present case not only upon its charter, but upon the adoption of

its plan by its Board of Directors. It claims that the adoption of its plan, in pursuance of its charter rights, creates an equity in its favor which it is entitled to assert against the Northern Ohio Traction and Light Company in the present case and upon the faith of which it is entitled to the equitable relief prayed for in its bill. It will be remembered that in *Sears vs. Akron*, *supra*, this Court did not determine whether the resolution of the Board of Directors adopting the plan, in pursuance of the charter rights of the Power Company, vested any right in that company to equitable relief, holding that it was not necessary to decide this question, in view of the fact that the charter rights of the Power Company had been altered and modified by the passage of the Act of 1911 authorizing the city of Akron to proceed with the construction of its water works. In *Sears vs. Akron* this Court, however, did decide that the facts alleged in the bill "are not such as entitle him (Sears) to relief in equity." The Power Company no doubt contends that the decision on this point was materially influenced by the fact that its charter rights were modified and altered, so far as the city of Akron was concerned, by the Act of 1911, but that its rights, so far as the Northern Ohio Traction and Light Company is concerned, cannot be affected by that Act.

It may be true that the decision of this Court on this point was influenced by the effect of the Act of 1911, but apparently, from the language of the opinion, this Court intended to hold that, independent of the Act of 1911, the plaintiff's Bill in that case failed to disclose any right to equitable relief.

In considering the question whether, under the law of Ohio, the adoption of a plan by the board of directors creates in favor of the corporation a prior right and entitles the corporation to enjoin all other similar corporations from interfering with the location so acquired, the District Court in the present case said (Record, page 39):—

"Whatever may be the fact in other jurisdictions, depending upon provisions of other constitutions or

laws, or the constructions thereof by other courts, it is thought by this Court that in Ohio the mere charter of a company for the utilization of natural resources for the public benefit does not constitute a definite and excluding contract for the use of such resources; that in the words of some of the argument here, the complainant acquired nothing more through its charter than a potentiality which amplifies into an actual exclusive possession only as it complies with the conditions of the laws of the State to the completion of appropriation proceedings. \* \* \* It is not true in Ohio that the character of complainant gave to it 'a vested right seemingly unlimited in time to exclude the rest of the world from its water sheds it chose' simply by declaring by resolution just what territory it hoped in the future to occupy to carry out its purposes."

The District Court refers to and relies upon its former decisions in the two Sears' cases, which were to the same effect on this point. This question has been fully presented with the authorities and argued in the original brief filed on behalf of the appellees. If the position there taken is sound, the plaintiff Power Company has failed to show any prior right and therefore no right to oust the Northern Ohio Traction and Light Company from the properties which it is now occupying in serving the public. If, on the other hand, the law of Ohio on this question is the same as the law in certain other States, as claimed by plaintiff Power Company, the decisions in which have been cited by it and upon which it apparently relies with much confidence, it does not follow that said company has shown any right to relief in the present proceeding. The general proposition upon which plaintiff Power Company relies to establish its right to a prior location may be sound in other jurisdictions, where the conflicting rights of railroad companies over their respective rights of way are involved. It is undoubtedly true that there are a great many cases in States other than Ohio in which a railroad company is held to

have acquired a prior location by the adoption of a route by proper resolution of its board of directors, and by filing a plan, if such filing is required, and said railroad company is entitled to an injunction against another railroad company, whose alleged rights were subsequently acquired, restraining it from interfering with that route. Even if this was the law of Ohio, plaintiff Power Company would have several difficulties to overcome before it could succeed in establishing its right to relief in the present case.

1. The fact that plaintiff Power Company has heretofore endeavored to condemn from the appellee, Northern Ohio Traction and Light Company the same tracts or parcels of land which it is endeavoring to acquire through a Receiver in the present proceeding, and that its right of condemnation has been denied by a court of competent jurisdiction, is a complete bar to any relief by the Power Company in the present case.

2. The fact that Sears, the mortgage trustee of the plaintiff company, failed to secure any relief in his suit against the city of Akron, and by reason thereof plaintiff Power Company's scheme for hydro-electric development cannot be consummated, places plaintiff Power Company in a position where it cannot interfere with the rights of any property owners to secure protection for it in aid of a plan of development which it is no longer possible for it to complete.

3. If there is any doubt about the final denial of plaintiff Power Company's right of condemnation, as suggested in paragraph 1 above, or any doubt of the soundness of the conclusion in paragraph 2 above, either one or both of said propositions show that plaintiff's alleged legal rights are, to say the least, of doubtful validity, and a court of equity will not interfere in aid of doubtful legal rights.

4. This is not a case of a contest between two rival Railroad Companies endeavoring to secure the same strip of

land for their respective rights of way. The Northern Ohio Traction and Light Company acquired the lands involved in the present case many years ago, and is lawfully in possession of them, using them for its own proper corporate purposes. The Bill in paragraph fourteenth alleges that the Traction Company has five different power houses located at various points, and that there is nothing which makes it necessary for said Company to own and possess the several tracts of land described in these proceedings, or to obtain power from the power plants erected thereon. If, therefore, plaintiff Power Company succeeds in establishing its prior right by notice of the adoption of its plan, which of course we insist it cannot do, and the time arrives when the Power Company is ready to exercise this right, the Traction Company will have to turn over the possession of these properties, just as any individual landowner would be required to do. Until that time arrives the Traction Company must be allowed to continue in possession and use of the properties for its corporate purposes.

5. Even if it be true that one Railroad Company with a prior location may enjoin another Railroad Company with a subsequent location from appropriating any part of the route upon which the first Company has the prior location, it does not follow that a hydro-electric company claiming a prior location upon hundreds of miles of territory for an extravagant and pretentious scheme of development can secure relief in equity against a property owner prior to condemnation, and the payment of compensation, even though that property owner is a *quasi* public corporation and asserts a claim of prior right for public purposes vested in itself.

6. The Bill in paragraph sixteenth alleges that the Traction Company has not and never has had any right or franchise to exercise the power of eminent domain. If this is true, plaintiff Power Company does not need the protection of a court of equity from preventing its property from being

appropriated by the Traction Company which, under the allegations of this paragraph of the Bill, has no power to appropriate it, nor is there any danger that plaintiff Power Company will be deprived of its property without due process of law and without compensation.

7. Paragraph twelfth of the Bill alleges that between January 31st, 1911, and February 24th, 1914, the Northern Ohio Power Company constructed a power house and improvements upon the tracts of land which the plaintiff Power Company wants to acquire through a receiver in this proceeding. Paragraph tenth alleges that on February 24th, 1914, the Northern Ohio Power Company sold and conveyed these properties to the Northern Ohio Traction and Light Company. The record shows that the Bill in the present case was sworn to on August 4th, 1916. It must have been filed on that day or shortly thereafter, that is, about two and one-half years after the power house and other improvements located on these lands were constructed and completed. These facts establish a clear case of laches, which of itself is sufficient to authorize and require a dismissal of the Bill.

Plaintiff Power Company in order to establish an equity in its favor, no doubt relies upon the allegation of paragraph twentieth of the Bill to the effect that it has acquired the absolute ownership of various parcels of land necessary for the construction of its improvement. It will be noticed that this paragraph twentieth does not state when these various parcels of land were acquired by the Power Company. The Power Company made this same argument in *Sears vs. Akron* and this point was made the subject of sub-division (3) of the opinion, which decided that nothing in this respect set forth in the Bill could relieve the plaintiff Power Company of the charge that its alleged rights "are not such as to entitle him (*Sears*) to relief in equity."

For the reasons set forth above, the decree of the District Court sustaining the motion to dismiss must be affirmed.

# VI. THE FEDERAL COURTS HAVE NO JURISDICTION TO ENTERTAIN PLAINTIFF'S CASE.

All of the parties, both plaintiff and defendants, are citizens of the State of Ohio. The jurisdiction of the Federal courts depends solely upon the point whether a Federal question is presented. The plaintiff Power Company complains that its alleged contract is being impaired in violation of the contract impairment clause of the Federal Constitution, and also that it is being deprived of its property without due process in violation of the due process clause of the Fourteenth Amendment. In *Sears vs. Akron* this Court held that the plaintiff Power Company has no contract to be impaired. In view of that decision the contract impairment clause is not involved and the jurisdiction of the Federal courts must be sustained, if at all, upon the charge that the plaintiff is being deprived of its property without due process. The Bill alleges that the complainant Power Company has certain rights and certain property, but it fails to show any interference by the defendants with any of such rights and property. If the plaintiff Power Company has the right to proceed with the development of its plant, nothing that the defendants are alleged to have done, or to be threatening to do, will or can interfere with plaintiff's progress to accomplish that result.

In *Underground Railroad vs. City of New York*, 193 U. S. 416, the plaintiff asked for an injunction to restrain the city of New York from constructing an underground railway, alleging that it had acquired certain rights to construct a similar road upon the same location under its charter and the filing of its plan. They relied upon the contract impairment clause and the due process clause. The Bill was dismissed for want of jurisdiction. This Court said (page 422):—

"If, on the face of complainants' statement of their own case, it does not appear that the suit really and substantially involved a dispute or controversy as to the effect or construction of the Constitution, on the

determination of which the result depended, the Circuit Court was right and its decree must be affirmed. *Defiance Water Co. vs. Defiance*, 191 U. S. 184."

This Court further said (page 430) :—

"The result is that it appeared on the record that complainants possessed no contract rights which were impaired, or of which they were deprived and that the suit did not really and substantially involve a dispute or controversy as to the application or construction of the Constitution."

In *Ramapo Water Company vs. New York*, 236 U. S. 578, the plaintiff water company undertook to enjoin the city from proceeding with the construction of water works. The plaintiff relied upon the contract impairment clause and the due process clause. The Bill was dismissed for lack of jurisdiction. This Court said (page 583) :—

"The District Court, being of opinion that the bill disclosed no such rights as the plaintiff claimed and therefore showed no real constitutional ground, dismissed the bill. The plaintiff's argument, while admitting that it must appear that there is a substantial question under the Constitution and that the formal averment of such a question is not enough, makes a rather useless attack upon the application of that principle in *Underground R. Co. vs. New York*, 193 U. S. 416, 48 L. ed. 733, 24 Sup. Ct. Rep. 494. If it is apparent that the bill is groundless, it does not matter very much whether the dismissal purports to be for want of jurisdiction or on the merits. But we are of opinion that the groundlessness of the bill is so obvious that it fairly may be said that no substantial constitutional question appears."

In this case the Ramapo Water Company undertook to cover, with a scheme as pretentious and extravagant as

the scheme of the Cuyahoga River Power Company in the present case; a very large territory, and contended that by adopting a plan under its charter and filing a map it had acquired prior rights upon this most extensive territory. On this point this Court said (page 584):—

“The direction to file a map of the route adopted and the land to be taken, coupled with the other provisions that we have recited, appears to us to have in view the route and the land needed for the route, and only that, not the thousand square miles that the plaintiff claims.”

And again (page 585):—

“But, as we have said, nothing short of a specific decision of the Court of Appeals would make us believe that the Act of 1895, gave to the plaintiff, without notice to land owners or other preliminary, a vested right, seemingly unlimited in time, to exclude the rest of the world from whatever watersheds it chose, simply by filing a map.”

These last two quotations are particularly pertinent when considering the claim of the plaintiff Power Company in the present case. This Ramapo case and also the Underground Railway case are express authorities in favor of the proposition that the Federal Courts have no jurisdiction to entertain plaintiff Power Company's case which, just as was true in the two cases named, does not present any substantial question arising under the Constitution.

In view of the above authorities this case should be dismissed for want of jurisdiction but, as suggested in one of the above quotations from the Ramapo Water case, it does not matter very much whether the dismissal purports to be for want of jurisdiction or on the merits, including, we might add, that the plaintiff's Bill fails to disclose any basis for equitable relief.

## VII. RELIEF PRAYED FOR.

The absence of basis for plaintiff Power Company's claim to relief in equity is more than offset by the searching relief prayed for (see Transcript of Record, page 14). The Bill asks that the defendants be enjoined from using the several parcels of land or the structures erected thereon or the waters of the river for the purpose of developing, generating or producing light, heat or power; from asserting or claiming that their use of these parcels and structures and waters is a public use; from interfering with plaintiff's exercise of its rights and privileges, including its right to acquire "by the exercise of the power of eminent domain" the title and ownership of the lands and from erecting additional structures or improvements upon these properties; that defendants be required and compelled to remove such structures and devices, already erected on these lands, or to grant and convey them to the plaintiff and that a Receiver be appointed to take possession of these structures and devices and, as incidental, that the plaintiff pay damages occasioned to it by the defendant's violations and takings of right of way, property, &c. The slimness of plaintiff's rights compares unfavorably with the fullness of plaintiff's claims.

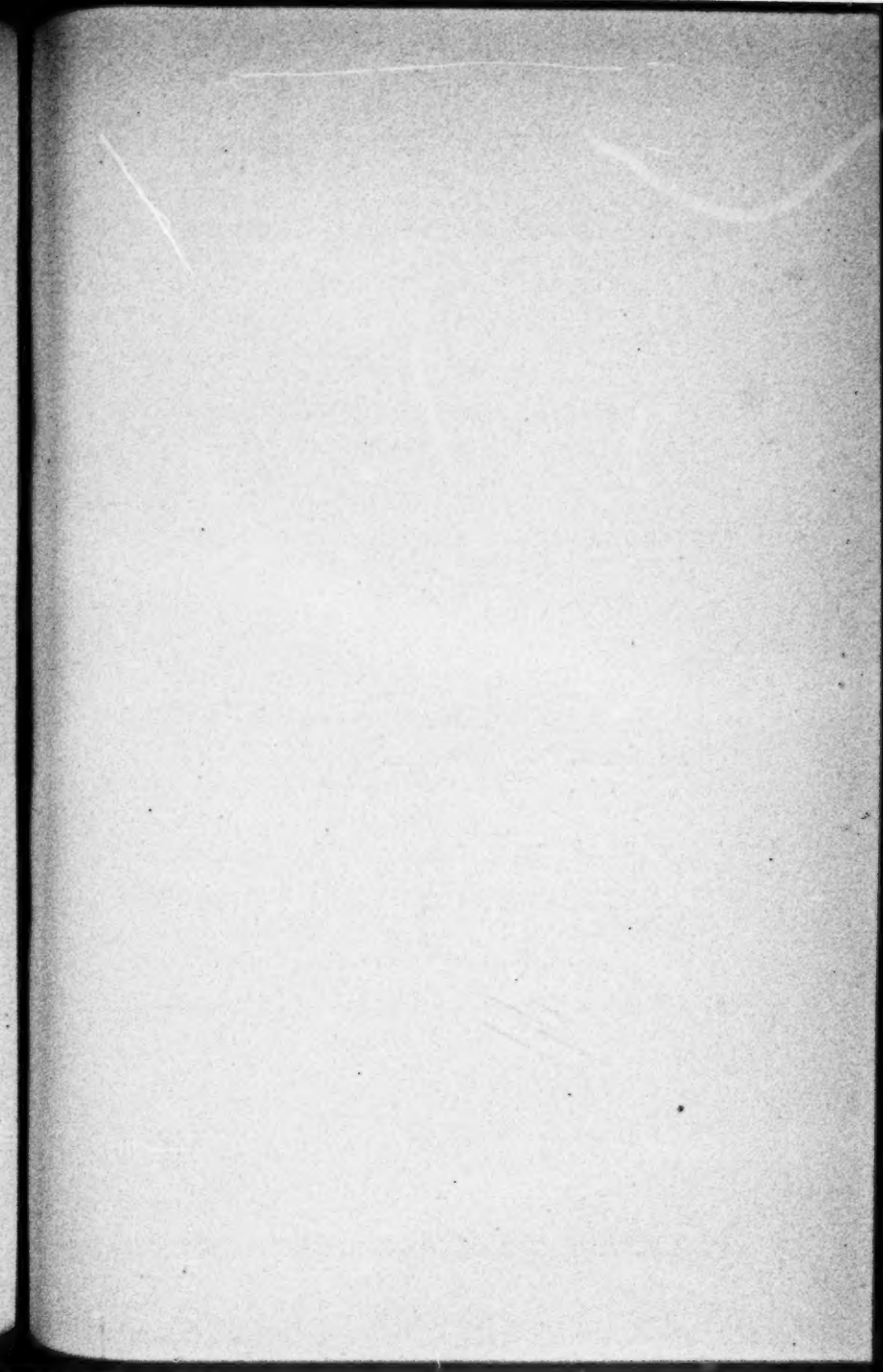
## VIII CONCLUSIONS.

The sole basis for plaintiff's claim is its alleged contract and property rights based upon its charter and the adoption of its plan. It asserts that by the adoption of its plan it acquired a prior location and the right to appropriate all lands necessary for the consummation of its scheme. We deny that under the law of Ohio the adoption of the plan gave the plaintiff Power Company any such prior right. In order, however, to meet plaintiff's position we assumed for the purposes of the argument that the adoption of this plan would, under ordinary circumstances, give it an alleged prior right and enumerated seven different reasons (*supra*, pages 15 to 17 inclusive) why, even on that hypothesis, plain-

tiff Power Company is not entitled to relief in equity. We have also shown that no substantial federal question is involved and on that account the federal courts have no jurisdiction.

We respectfully submit that the decree of the District Court sustaining the motion to dismiss must be affirmed.

JOSEPH S. CLARK,  
*Of Counsel for Appellees.*





**IN THE UNITED STATES DISTRICT COURT.**

Northern District of Ohio, Eastern Division.

No. 310.

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**JOHN H. SEARS, AS TRUSTEE,**  
**Plaintiff,**

vs.

**THE CITY OF AKRON,**  
**Defendant.**

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**MEMORANDUM OPINION.**

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CLARKE, District Judge:

This cause came on for hearing upon motion to dismiss the bill of complaint and was submitted to the court on briefs.

Stated in very general terms the claim of the bill is that the plaintiff is a trustee for the bond-holders under a mortgage claimed to have been issued by the Cuyahoga River Power Company dated July 13th and acknowledged on July 15, 1915.

The plaintiff claims that the Power company "by appropriate corporate resolution" on June 8, 1908, adopted a plan called the "plan of the Roberts Abbott Company," which definitely located on designated lands proposed improvements for the generating and transporting of electricity, including a large dam and various reservoirs, which action the bill claims "appropriated" to the use of the company, the water of the Cuyahoga River and apparently its adjacent banks for many miles.

Later, on April 23, 1909, the company adopted an amended plan of procedure called the "Von Schon Plan," covering with its blanket scheme a much greater extent of territory.

The purposes of the Power Company as stated in the twelfth paragraph of the bill are sweeping in character involving the construction of a series of dams in the Cuyahoga River, Tuscarawas River, Mud Brook, Brandywine and Tinkers Creeks and tributaries of each of these, being situated in Cuyahoga, Medina, Summit, Portage, Stark, Geauga, Tuscarawas and adjacent counties in the State of Ohio, and it is added that the purpose is to construct and maintain canals, locks and raceways to regulate and carry the head of water which it is proposed to obtain from the various designated streams to power houses and thence to distribute to consumers the electricity which it is proposed to generate.

It is stated that the character of the improvements proposed is such that they are not to be located at any single place, and therefore the eastern terminus of the projected plan is designated to be at or near the village of Burton Station in Geauga County, and its southern terminus at or near Canal Dover in Tuscarawas County. It may be noted that this scheme covers the water and water sheds of what must largely exceed 100 miles of the rivers and streams of northeastern Ohio.

The bill alleges diligent conduct on the part of the Power company during the years between its organization on May 28, 1908, and the filing of the bill in this case on July 24, 1915, but its chief industry, as the court gathers it from the bill, appears to have been making surveys and making claims against the city of Akron for invasion of what it claimed to be its rights, until the execu-

tion of the mortgage dated July 13-15, 1915, under authority of which the plaintiff sues.

It is alleged that on May 7, 1912, the Power Company duly located and adopted by corporate resolution specific surveys and described each parcel of land necessary in the execution of its plan and the claim is added that by the corporate action thus taken adopting specific surveys and descriptions of the lands required for carrying out its projects, the Power Company acquired and became possessed of a valid right and franchise to construct and maintain upon the lands and waters embraced within the descriptions so adopted as aforesaid, the reservoirs, dams, power houses and other appurtenances requisite for the development of hydro-electric power in accordance with the plans adopted by it, and to acquire and utilize said parcels of land for the accomplishment of its objects and purposes and from and after the time of the adoption by said company of said descriptions of said parcels of land, it is claimed the lands and waters embraced within said descriptions were and ever since have been and now are legally and equitably subject to said company's franchise.

Thus the claim of the plaintiff is that by this entirely private corporate action of the Power Company and without any payment to or even notice to the owners of the land over which it resolved to operate, it acquired an equitable right to use the parcels of land designated in its private records as necessary for its purposes, which right it now prays this Court to protect against invasion threatened by the city of Akron, under the circumstances stated in the bill, which will be stated later on in this opinion.

It should be added that the bill shows that the Power Company claims to have acquired during the years

between 1908 and 1915 a small piece of property—approximately a quarter of an acre of land—and a more or less indefinite right to a short stretch of the bed of the Cuyahoga River and indefinitely described options upon other indefinitely described properties.

The plaintiff sues as trustee for the bond-holders under the mortgage referred to dated July 13-15, 1915, to secure bonds of the aggregate face value of \$150,000, which bonds the mortgage, made a part of the bill, declares were issued to pay for money borrowed and services contracted for in the month of April, 1909. By this mortgage, title was conveyed to the trustee in all of the lands which the Company claims to own, and in certain options which it claims to have acquired.

The action of the city of Akron of which complaint is made is that beginning with the securing of the passing of a bill by the Ohio General Assembly on May 17, 1911, that city by various proceedings of its council and officials acquired territory and constructed an extensive dam or reservoir to supply its inhabitants with water from the Cuyahoga River.

The bill was filed on July 24, 1915, and it is alleged that the defendant had announced its intention of diverting the waters of the Cuyahoga River to the use of its inhabitants on the first day of August, 1915, in violation of the rights, property and franchises of the Power Company.

There is no allegation that any part of the land which the Power Company owns is actually invaded by any of the constructions of the defendant, and the real substance of the complaint is that the Power Company's project of utilizing the waters of the Cuyahoga River and many other streams for many miles will be impaired by the city's use of the water of the river as threatened.

In addition to all this, it is alleged that the city of Akron is without funds and is financially unable to pay any damages which may be caused to the Power Company, if it is not restrained from the use of the dams and reservoirs which it has constructed, and that all that the city has done in providing for the use of the waters of the Cuyahoga River has been done in bad faith and fraudulently for the benefit of certain individuals and private corporations, and not for the benefit of its inhabitants generally.

These allegations with respect to the insolvency of the city of Akron and the fraudulent conduct of its officers are mere conclusions of the pleader without any facts being stated to support them, and therefore, though this motion to dismiss admits as true all allegations which are well pleaded, they can serve no useful purpose in making the case one in equity if without them it would be one at law for damages. Even if the law on this point were different from what I have stated it to be, this Court would refuse in obedience to any technical rule to accept as true any such allegations. The city of Akron is not insolvent, but is abundantly able to pay, and in the judgment of this Court desires to pay any claims which it may justly owe, and it is impossible to believe that the many public officials who must have participated in the construction of the great public work under consideration in this case can have been false to the trust imposed in them for many years by the community in which they lived.

Under the state of facts thus alleged in the bill, this Court is clearly of the opinion that the Power Company, by the mere adoption of its Board of Directors of a plan of its proposed improvement, did not acquire as against the city of Akron any interest whatever, legal or equit-

able in the lands and waters used or intended to be used by it in providing a water supply system for its inhabitants.

In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of *Columbus, etc., Co. vs. T. & O. C. Ry. Co.*, 32 W. L. B. 186. This is a Common Pleas Court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself strongly confirmatory of its authority as an expression of the accepted law of the state. The court says:

"But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned the Railroad Company may elect not to pay the price and accept the land. The fact that a Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement."

So in *State of Ohio ex rel. vs. Cincinnati*, 17 O. S., 103, the court states what is well known to this Court to be the opinion of the profession of the state that

“no appropriation of the lands of the relators could be completed, no title from them could be acquired and no incumbrance could be imposed on their estate by the railroad company until the amount of compensation fixed by the findings of the jury was paid in money or secured to be paid, by a deposit of money.”

The plaintiff has no power of eminent domain greater or other than a railroad company has. In the State of Ohio there is not now and never has been any statute requiring a corporation desiring to exercise the right of eminent domain to file in any public office a map or survey of the route or plan of the improvement adopted by the Company, so that the rule that land owners or other corporations are in any wise estopped or their property encumbered by the mere private resolution of a company possessing the power of eminent domain has never prevailed in this state as it has in some other states. Grave constitutional questions are argued in the briefs filed in support of this bill to the effect that the use of land by the city of Akron and of the water supply of the Cuyahoga River, which the plaintiff claims it appropriated to itself by adopting upon paper its grandiose scheme, offend against the constitution of the State of Ohio and of the United States by the taking of the plaintiff's property without due process of law.

The sufficient answer to these claims is to be found in the decision of the Supreme Court of the United States in *Ramapo Water Company vs. The City of New York*, 236 U. S., 579, in which the court, passing upon a case strikingly similar in many respects to the one at bar says:

"The District court, being of opinion that the bill disclosed no such rights as the plaintiff claimed, and therefore showed no real constitutional ground, dismissed the bill. The plaintiff's argument, while admitting that it must appear that there is a substantial question under the Constitution, and that the formal averment of such a question is not enough, makes a rather useless attack upon the application of that principle in *Underground Railroad vs. New York*, 193 U. S., 416. If it is apparent that the bill is groundless, it does not matter very much whether the dismissal purports to be for want of jurisdiction, or on the merits. But we are of opinion that the groundlessness of the bill is so obvious that it fairly may be said that no substantial constitutional question appears."

Since the bill in this case does not show any substantial property, legal or equitable in the plaintiff which is invaded by the defendant, it is obvious that it is not important to consider constitutional questions which it is claimed are involved in the case.

It is perhaps not improper to note that the counsel for the appellant in the case last cited appears as the solicitor for the plaintiff in this case and files an elaborate brief in support of substantially the doctrine which was rejected with such emphasis by the Supreme Court in that case.

What we have said sustains the motion to dismiss the bill, but another view of the case presses insistently upon the attention of the court. The bill was filed on the 24th day of July, 1915, and it is alleged therein that the city of Akron was threatening to divert the waters of the Cuyahoga River to its use on the first day of August, 1915. It also appears from the bill that the capacity of the water works which the city had constructed was 194,000,000 gallons a day. If the court had no other knowl-

edge than these allegations, it would be plain that the city of Akron has been for many years engaged in the construction of this water supply system and that it must have cost many millions of dollars.

It is alleged in the bill that the company for which the plaintiff is trustee on July 14, 1915, filed a bill in this Court praying for an injunction on substantially the same grounds as those stated in this cause which bill was dismissed for want of jurisdiction, and that an appeal from that decision is now pending in the Supreme Court of the United States, and it is also alleged that various futile attempts to compromise with the city of Akron were made by the plaintiff. The mortgage under which the plaintiff was trustee is by reference made a part of the bill, and it recites that it was given to secure the payment of money borrowed and services contracted for in the month of April, 1909. Persons so interested in the affairs of the Power Company as such creditors must have been, must have known of the prior attempt in this Court to enjoin the city of Akron from going forward with its water supply construction, and must have known also that the city was expending large sums of money in providing for that water supply. The trustee whose rights cannot rise higher than those of the creditors he represents, did not begin this suit, until as we have said, within six days of the time when the city had announced that it was about to make use of the completed construction which must have cost a very large sum of money.

These facts must be taken into consideration when a chancellor is asked to enjoin a great public improvement, and by his order inconvenience the inhabitants of a city with approximately 100,000 inhabitants.

Such a state of facts makes sharply applicable the decision of the Supreme Court of United States in New

*York City vs. Pine*, 185 U. S., 93, a case with many features not greatly different from the one at bar. Here the plaintiff sought to enjoin the city of New-York from the use of the water of a river after it had expended a large sum of money in providing for use of such water. The court discussing elaborately the law applicable to such a state of facts, says:

"The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights. *Vigilantibus non dormientibus aequitas subvenit* is a maxim of equity." (p. 98) \* \* \*. The court quotes with approval from *Smith vs. Clay*, 3 Brown Ch., 639, as follows:

" 'A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence.' "

The review of many cases is concluded as follows, viz:

"From these authorities it is apparent that the time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights, but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted for the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to

enforce those rights, and in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal."

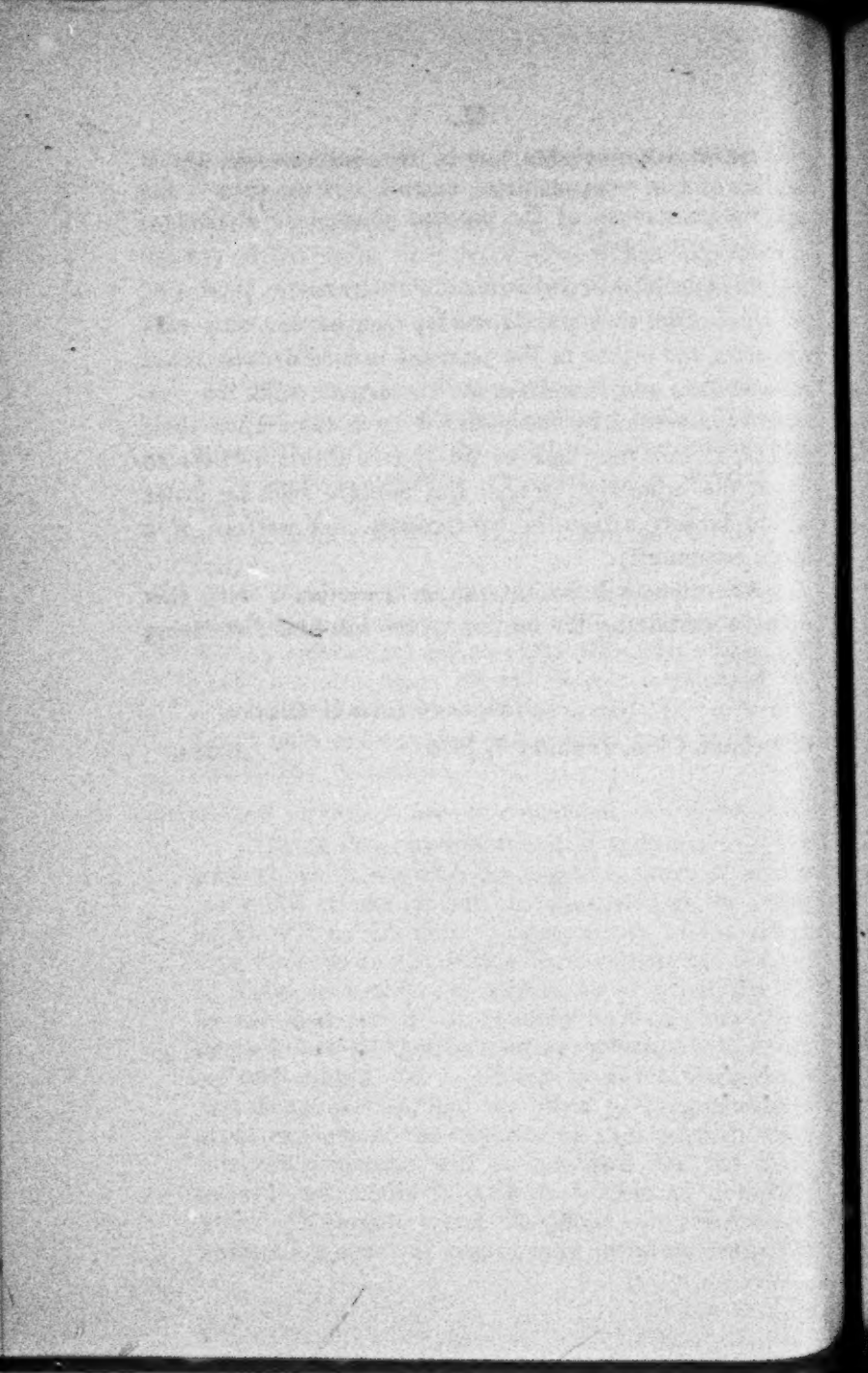
It is decided in *Sullivan vs. Portland, etc., R. R. Co.*, 94 U. S., 806, that a court of its own motion may take notice of the laches of the plaintiff and refuse the relief prayed for, and therefore for the reason that the persons represented by the plaintiff have slept upon their rights, if any they had or have, this Court refuses to grant the injunction prayed for, because such an order would largely affect the convenience and welfare of a large community.

An order will be entered in accordance with this opinion sustaining the motion to the bill and dismissing the suit.

(Signed) John H. Clarke,

Cleveland, Ohio, January 7, 1916.

Judge.



**IN THE UNITED STATES DISTRICT COURT.**

Northern District of Ohio, Eastern Division.

In Equity. No. 344.

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JOHN H. SEARS, AS TRUSTEE,  
Plaintiff,

VS.

THE NORTHERN OHIO TRACTION & LIGHT COMPANY AND  
THE NORTHERN OHIO POWER COMPANY,  
Defendants.

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**OPINION.**

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CLARKE, District Judge:

This cause came on to be heard upon the motion of the defendant that it be dismissed upon two grounds, first, because the bill does not state a cause of action within the equity jurisdiction of this Court; and second, because the alleged property rights and interests of the plaintiff have been adjudicated or are now pending for final adjudication in the Supreme Court of the United States.

The plaintiff sues as trustee under a mortgage executed to him as grantee of "The Cuyahoga River Power Company" dated the 13th day of July, 1915, but acknowledged on the 15th day of July, 1915. (Hereinafter the grantor will be referred to as "The Power Company.") By this mortgage, in order to secure an issue of \$150,000 in bonds, the Power Company conveyed to the plaintiff as trustee, various parcels of property therein described and options upon others, and also the right

or franchise of the Power Company to appropriate and use certain of the waters of the Cuyahoga River and the lands to which the same are appurtenant.

It is alleged that \$125,000 of these bonds have been issued and are owned by bona fide holders for value, but there is no allegation in the bill that the Power Company has defaulted in payment of either the interest or principal of the bonds. The claim in general which is made the basis of the suit is that the defendants have taken such action with respect to three parcels of land, two of which are in the bed of the Cuyahoga River and are covered by its waters, and one a small parcel immediately adjacent to the river, that unless the defendants are restrained from further use of them, the corporate purpose of the Power Company will be impossible of accomplishment, and thereby the security which the plaintiff holds by the virtue of the mortgage referred to will fail and be of no value.

It is alleged that the defendant, the Northern Ohio Power Company between January 31, 1911, and February 24, 1914, a year and a half, be it noted, before the date of the plaintiff's mortgage, constructed upon the three parcels of land described in the petition, a power house with boilers and other machinery necessary for the generation of electricity, and also constructed a dam in the Cuyahoga River from which power is derived for the operation of the plant, and that this plant has been in use by the defendant, the Northern Ohio Traction and Light Company for the generation of the electrical power with which it operates various lines of interurban and street railway since February, 1914.

It is also alleged that the defendant, The City of Akron, has acquired from The Northern Ohio Traction

and Light Company all rights which it had to use the waters of the Cuyahoga River, and it must be inferred that it is supplying such water to the inhabitants of that city.

The prayer of the bill is that the defendants be enjoined from the use of the power plant, which upon the face of the bill appears to have been completed a year and six months almost before the mortgage to the plaintiff was executed; and that the defendant, The City of Akron, be enjoined from the use of and be required to remove any structures which have been erected upon the land described in the bill, and which may interfere with the possession and use by the Power Company of the lands described for the accomplishment of its corporate purposes.

It is to be noted that there is no allegation that either of the defendants is insolvent, and there obviously is no reason why the plaintiff, the trustee of the mortgage cannot be fully compensated by a money judgment for any damage which he as trustee can suffer.

The plaintiff states in great detail that the Power Company was incorporated on May 29, 1908; that on June 4, 1908, it adopted a detailed plan for the development of electric power by use of the waters of the Cuyahoga River, which resolution is attached to the bill as an exhibit, and is made a part of it. While other parcels of land are described in the bill, the plaintiff alleges that three parcels—one known as the Everett, one as the Sackett and the one as the A. B. and C. parcel are indispensably necessary to the accomplishment of the purposes of the Power Company, and it says that on June 5, 1908, the Power Company instituted proceedings in the Probate Court of Summit County, Ohio, to appropriate these three parcels of land to its use, and that this

suit was continually pending until subsequent to the 20th of January, 1911.

It is alleged that on the 20th day of December, 1910, while this suit was pending against Henry A. Everett, said Everett executed the deed for what is designated as the Everett parcel of land, to the Northern Ohio Realty Company, and that on January 20, 1911, the Power Company instituted a second appropriation proceeding in the Probate Court of Summit County to appropriate the Everett parcel and the A. B. and C. parcel of land. In this proceeding the Northern Ohio Realty Company was the sole defendant. It is alleged that this case is now pending in the Supreme Court of the United States undetermined.

It is further alleged that on January 21, 1911, while said appropriation proceeding was pending The Realty Company conveyed the Everett parcel to the defendant, The Northern Ohio Power Company; that on July 18, 1911, The Northern Ohio Power Company purchased the Sackett parcel, and that on February 24, 1914, this Power Company conveyed all of its property to the defendant Traction Company, which thereupon took possession of and now holds possession of all three parcels of land and the improvements erected thereon.

It is alleged that on January 20, 1911, which is the date of the conveyance by the Realty Company to The Northern Ohio Power Company there were no constructions or improvements of any kind upon either of the three parcels of land, but that between the 20th of January, 1911, and the 24th of February, 1914, a dam which must be very extensive in character and a power house for the generation of electricity, which is described as occupying a space of 150 by 330 feet, with a maximum capacity of 83,000 horse power, were erected upon the

Everett, Sackett and A. B. and C. parcels of land, and that this power plant has been used since February, 1914, as the source of power with which the defendant Traction and Light Company operates various interurban and street railways.

It is alleged that the Traction and Light Company intends to continue the use of the power house which it was using at the time the bill was filed, and that it has not paid or offered to pay to the Power Company, the mortgagor, anything in compensation for the rights which it claims it has in the three parcels of land described.

The plaintiff alleges that the Power Company has been actively and diligently engaged in the prosecution of its corporate business, and in proceeding to carry out its corporate purposes since 1908, and that it has acquired various parcels of land and has options upon others, but avers that the reasons why it has not acquired all that land and water rights necessary to enable it

*“to commence and complete the physical construction of its plant are that it has been prevented by the illegal interference of the defendants, and the immense amount of litigation in which it has become involved, which litigation and interference have made it impracticable for said Power Company to proceed.”*

In an amendment to the bill, filed March 31, 1916, making the City of Akron a party to this cause, it is alleged that on the 16th day of June, 1914, the defendant Traction Company executed and delivered a deed to the City of Akron in which it is recited that the Traction Company is the owner of various parcels of land, including the Everett, Sackett and A. B. and C. parcels and

waters appurtenant thereto, and that for the purpose of supplying the City of Akron and inhabitants thereof with water that city had declared its intention to take and appropriate all of the waters of Cuyahoga River at and above a designated line, and it is alleged that in consideration of the sum of \$348,000 paid by the City of Akron, the Traction Company conveyed to it all of its water rights and privileges and "all other rights and assessments in or to said waters or to the use thereof which are or could be taken, interfered with or destroyed by the proposed taking and diverting of the water of said river by said City of Akron," but in said deed The Traction Company reserves the right to use such waters of the river as may not be taken or used by the city of Akron.

It is alleged that at the time the city of Akron made this purchase, it had full knowledge of the existence of the Power Company, and that it had made locations of a proposed plant upon the Everett, Sackett and A. B. and C. parcels and had determined to acquire them and the waters appurtenant thereto for the operation of its proposed plant.

In another suit commenced by the plaintiff in this Court on the 24th day of July, 1915, but against the city of Akron only, substantially the same facts as in this case, together with many others, are alleged in the bill. The chief difference between the two bills which this Court discovers is that in the present bill it is more distinctly asserted than in the former one, that the three parcels of land known as the Everett, Sackett and A. B. and C. parcels are occupied by the defendant Traction Company, and that they are essential to the accomplishment of the corporate purpose of the Power Company

than this is alleged in the former bill; but in substance the allegations of the former bill and those of the present one are the same, viz., that the action taken by the city of Akron alone in the former bill and in this bill by the city of Akron and the Traction Company have rendered impossible the accomplishment of the corporate purpose of the Power Company, and the prayer in the two cases is almost precisely the same, indeed in the present case the prayer is very certainly copied with slight variations from the one in the former case, so slight that in this second case the plaintiff prays "that the various acts, statutes and laws complained of as violating the Power Company's rights," etc., be declared unconstitutional and void, when no such acts, statutes and laws are referred to in the bill, although there were several such referred to in the former bill.

On July 14, 1913, the Power Company filed in this Court a bill making the city of Akron, Ohio, defendant, and on February 14, 1914, an amended bill was filed in which in substance the same claim is made as is made in this case, viz., that the city of Akron has entered upon and claims the exclusive right to use the lands described in the bill in this case we are considering and other lands alleged to be necessary to the accomplishment of the corporate ends of the plaintiff, and also to take and use the waters of the Cuyahoga River appurtenant thereto. This case was dismissed by this Court for want of jurisdiction, but that decision was reversed by the Supreme Court of the United States and the case is now pending in this Court and can be set down for early trial.

The prayer in this case is for an injunction restraining the city of Akron from constructing a dam, (which is now completed) in the Cuyahoga River, as it was then

purposing to do and from appropriating the waters of the Cuyahoga River for the use of its inhabitants.

It is apparent that the trial of this case would so determine the essential rights of the Power Company in the subject matter of the bill in the case we are considering as to in effect determine any rights which the plaintiff could possibly have as trustee under a mortgage given by the Power Company and dated so late as July, 1915.

Again it is alleged, as we have said, in the bill we are considering, that on January 20, 1911, a suit was commenced against the Northern Ohio Realty Company, the grantor of the defendant, Northern Ohio Power Company, to appropriate to the uses of the grantor of the plaintiff, the Everett and A. B. and C. parcels of property described in the bill, which suit "is now pending in the Supreme Court of the United States undetermined." It is also alleged in the bill that a similar suit to appropriate the Sackett parcel to the use of the Cuyahoga River Power Company, grantor of the plaintiff, was commenced in the year 1908, and was continuously pending until subsequent to January 20, 1911, but whether it has been finally decided does not appear in the bill.

It seems clear enough that if these two appropriation suits are decided in favor of the grantor of the plaintiff in this case, and if that grantor pays the amount of the judgments which may be rendered in them in favor of the owners of the property, the right of the plaintiff in the three parcels of land described in the bill we are considering would be fully determined, and the plaintiff's grantor would be put in possession of said lands by any court rendering such judgment, and thereby the plaintiff would be made secure in all of the rights which he is claiming in the case we are considering.

Yet again in the case hereinbefore in this opinion referred to as commenced by the plaintiff on January 24, 1915, this Court entered a decree dismissing the bill for the reason among others that it did not state a cause of action against the defendant, the city of Akron. From this decision an appeal has been taken to the Supreme Court of the United States. A motion by the defendant to advance that case for hearing has been denied, and it is still pending for disposition in that court. It seems clear to this Court that the decision of that case by the Supreme Court will so determine the issues involved in this later case as to certainly settle all the rights of the plaintiff without further trial.

Thus from the allegations of the bill in this case, and from the records of this Court it appears that there are now pending three (possibly four) suits, in addition to this one, of such character that if the plaintiff prevails in any one of them all of the rights asserted by the plaintiff in this case will be established.

If the appropriation case, if there is but one, or cases if there are two, are such as the plaintiff alleges that they are, the decision of them will determine the rights of the plaintiff grantor in the premises described in the bill in this case, and the rights of the plaintiff cannot be higher or other than the rights of the grantor, since the mortgage under which he claims was executed long subsequent to the commencement of these cases, and long after everything complained of by the plaintiff was done by the defendants.

*Old Colony Trust Co. vs. Omaha*, 230 U. S., 100.

*Keokuk & Western R. R. vs. Missouri*, 152 U. S.,

Over such a statutory remedy at law seemingly adequate for the protection of every right the plaintiff may have, a court of equity cannot take jurisdiction of the case. Convinced also as I am that the case now pending in the Supreme Court of the United States in which the plaintiff in this case is the plaintiff involves every question which is involved in this case, I conclude that the plaintiff is clearly bound by that decision and that he cannot be permitted to relitigate the same questions in this case.

The case reversed by the Supreme Court and now pending in this Court for trial clearly involves the rights of the plaintiff's grantor *ca.* which the plaintiff in this case must rely, and since his rights as trustee of the mortgage were acquired long subsequent to the commencement of that suit, a decision of it must conclude the plaintiff in this case, and for this reason also the plaintiff should not be permitted to again relitigate the same question.

In addition to all this it seems very clear that the claim of the plaintiff in this case, mere trustee as he is under a mortgage, is plainly one which can be fully compensated in money, and since there is no allegation that any of the defendants are insolvent, it would seem that if the plaintiff really has any such rights in the premises described in the bill as he claims that he has, there is no reason why a suit at law for damages against the defendants would not be an adequate, complete and perfect remedy for the plaintiff, and for this reason also, if there were no other, the motion to dismiss the bill must be sustained. Judicial Code, Sec. 267.

The conclusion which we have reached also calls for the dismissal of the bill upon the second ground of the

motion filed, viz., because the alleged property rights of the plaintiff have been adjudicated in the case which is now pending for review in the Supreme Court of the United States. It is difficult, as we have said, to discover any substantial difference in the claims asserted in the bill filed in this case from those asserted in the case commenced in this Court by this same plaintiff in July, 1915, which is now pending in the Supreme Court of the United States, and there can be no doubt that the disposition of that case will dispose of this one. For this reason also the motion of the defendant to dismiss the bill will be sustained.

A decree will be entered in conformity with the conclusions of this opinion.

JOHN H. CLARKE,  
*Judge.*

Cleveland, Ohio, May 25, 1916.